BY HAND

June 29, 2001

Mary Cottrell
Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

RE: DTE 01-28 (Phase II)
Comments of the Utility Workers Union of America

Dear Ms. Cottrell:

The Department of Telecommunications opened this proceeding to determine, among other issues, "terms and conditions by which a single-bill option may be made available to customers and competitive suppliers within the existing statutory and regulatory framework." Notice of Inquiry, May 9, 2001, at 1-2. Competitive suppliers have expressed a keen interest in sending "consolidated" bills to consumers -- bills that reflect both the supplier's charges and the distribution-related charges of the local utility company. The Utility Workers Union of America, thanks the Department of Telecommunications and Energy for allowing all interested parties the opportunity to comment on the legal framework for providing consolidated bills. Quite simply, the legislature clearly prohibits anyone other than the distribution company from sending consolidated bills until new statutory language is adopted.

Legal Background - Section 312

DTE 01-28 arises in connection with Section 312 of the Restructuring Act (St. 1997, c. 164). In Section 312, the Legislature prohibited the Department from "unbundling" metering and billing services, without first following specified hearing procedures, making required factual findings, and seeking Legislative approval to unbundle. In relevant part, Section 312 provides that the Department:

> is . . . directed to commence an investigation and study relative to the manner in which metering, meter maintenance and testing, customer billing, and information services have been provided . . . and determine whether such services should be unbundled and provided through a competitive market . . . .

After then describing the minimum hearing processes that the Department must employ, Section 312 further provides:

> In the event that said department determines that such services shall be subject to unbundling and competition . . . said department shall, by no later than January 1, 2001, file its recommendations, along with drafts of legislation necessary to implement said recommendations, with the clerk of the house of representatives. *Any unbundling and creation of retail competition of such services shall not commence unless statutorily allowed through amendments to said [General Laws] chapter 164 . . .*

(Emphasis added).

Department's Report in Response to Section 312

The Department filed its "Report to the General Court Pursuant to Section 312 of the Electric Restructuring Act" ("Report") on December 29, 2000. Regarding *metering-related services*, the Department concluded that these services:

> should not be unbundled and provided through a competitive market because such competition: (1) would be extremely complex to implement . . . (2) would not produce benefits [beyond those] . . . that would otherwise be realized through the existing regulatory framework; (3) may not result in cost savings to customers; and (4) would result in significant disruptions in distribution company employee staffing levels.

Report, at 22-23. The Department announced that it would "open a proceeding to establish terms and conditions by which *distribution companies* [not competitive companies] will install advanced metering equipment." *Id.* (italicized and bracketed material added). The Department already opened that proceeding and issued an order on May 18, 2001. DTE 01-28 (Phase I).

Regarding *billing-related services*, the Department made the same four findings noted above, e.g., that unbundling these services (1) would be complex to implement; (2) would not produce benefits; (3) may not result in savings; and (4) would significantly disrupt staffing levels. The Utility Workers had opposed unbundling for all of these reasons and more.[1] The Department concluded that "billing-related services should not be unbundled from other monopoly services provided by distribution companies." However, the Department noted that it would "open a proceeding to establish rules and procedures by which a supplier single bill option will be made available to customers and competitive

[1] UWUA filed initial comments on August 1 and reply comments on September 7, 2000.

suppliers." *Id.* At 31-32. At the time, UWUA thought that this quoted language described actions by competitive suppliers that would not be allowed under Section 312, that is, rendering consolidated bills without specific legislative authorization. But in the absence of any more specific order or proposal, UWUA had no reason or venue in which to raise its concerns.

Section 312 Does Not Allow for Consolidated Billing Except by Distribution Companies

The Department has now opened the current proceeding, DTE 01-28 (Phase II) and invited parties to comment on whether competitive suppliers may render consolidated bills. Comments at the technical session on June 7 made it clear that competitive suppliers still advocate this approach and that the Department is aware of the potential legal obstacles.

Section 312 is quite clear: "unbundling" of billing services and allowing those services to be offered by competitive companies "shall not commence unless statutorily allowed through amendments to said chapter 164." To the extent any party may argue that Section 312 allows consolidated billing by competitive suppliers, UWUA notes that under Massachusetts law:

> Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning.

G.L. c. 4, §6, cl. 3rd. In this instance, both the "common and approved usage" rule and the "technical words" rule support the conclusion that competitive suppliers cannot render consolidated bills unless the legislature amends G.L. c. 164. In interpreting the portion of Section 312 that reads "shall not commence unless statutorily allowed through amendments to said chapter 164," the Department must construe this phrase "according to the common and approved usage" of the plain and simple words employed. The legislature could not have more clearly stated that certain changes to metering and billing practices (i.e., "unbundling") cannot proceed unless the legislature amends chapter 164. The Department has already acknowledged this. "Report," at 2.

Regarding the word "unbundling" itself, both its common usage and its more technical meaning in utility regulation lead to the same conclusion. In common usage, to "unbundle" is "to give separate prices for equipment and supporting services" or "to price separately." *Webster's New Collegiate Dictionary* (1977 Ed.). Allowing competitive suppliers to render consolidated bills would allow these companies "to price separately" for billing services. Similarly, distribution companies would have to price their billing services separately so that customers who choose to receive billing services from their

competitive suppliers would not be charged twice for the same service.[2]

To the extent "unbundling" has a distinct meaning as a technical term in the field of utility regulation, the meaning of this phrase within the context of Section 312 is quite unambiguous to the Department, the parties to the proceeding, and, indeed, to those involved in utility restructuring almost anywhere in the United States.[3] As early as 1995, the Department noted that unbundling involves the separation of "rates for generation, transmission, distribution and ancillary services." DTE 95-30, at 29 (August 15, 1995). If competitive suppliers separately provide or charge for billing services and distribution companies develop separate "backout credits" or charges for their billing services, this is unbundling, within any established technical meaning of the word.

The courts of this Commonwealth have repeatedly noted that:

> a statute must be construed "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Industrial Fin. Corp. V. State Tax Comm'n*, 367 Mass. 360, 364, 326 N.E2d 1 (1975), quoting *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934).

Acting Superintendent of Bournewood Hospital v. Lynda Baker, 431 Mass. 101, 104 (2000). The intent of the legislature in drafting Section 312 is clear. The "main object to be accomplished" was to prohibit the opening of metering and billing services to parties other than distribution companies unless

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[2] *See, e.g.,* "Order Providing for Customer Choice of Billing Entity," NYPSC #99-M-0631 (March 22, 2000), at 3 ("Our power to set 'just and reasonable rates' includes setting delivery charges *that do not include a cost for non-existent utility billing*"); at 10 ("Because the utilities . . . recover the cost of billing and customer care from retail access customers in delivery rates, they will need to develop *credits to be deducted from the delivery rates (backout credits)* for those instances where the ESCOs bill for both aspects of utility service. *Utilities will also need to develop charges in the instance where they do all the billing*.") [Emphasis added]. Clearly, allowing suppliers to render consolidated bills will require unbundling of billing services and charges.

[3] See, for example, the discussion of unbundling by The New Jersey Division of The Ratepayer Advocate in *Preliminary Position Paper on Unbundling Utility Costs And Services February 1998 (* http://www.rpa.state.nj.us/unbunnht.htm)("Unbundling can also allow competing providers to establish their identity with customers (e.g., through billing services) and distinguish themselves in the marketplace").

the Department first made required findings, submitted recommendations to the legislature, and obtained explicit legislative authority to proceed. Were the Department to allow competitive suppliers to render consolidated bills without first obtaining legislative approval, it would "render as superfluous" key portions of Section 312 and fail to "effectuate the presumed intention of the Legislature" thus violating well-established rules of statutory construction. *Fleming v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375 (2000).

The Department has appropriately asked the parties whether it may be possible to proceed with consolidated billing by competitive suppliers in the absence of further legislative action. The answer is "no." If the Department wishes to allow competitive suppliers to send consolidated bills, it should seek appropriate legislative authorization.

Payment Allocation

At the technical session on June 7, parties made various proposals for allocating partial payments by customers to the bills due from the distribution company and any competitive supplier. UWUA's primary concern is that any changes in the current rules may well increase the likelihood that customers, especially residential customers, would go without essential utility service. Under 220 CMR Parts 25 and 11.04(11), residential customers (especially the elderly, ill and poor) enjoy extensive procedural and substantive protections from termination of utility service. However, customers can be terminated for lack of payment if the company follows the mandated procedures and if no absolute prohibition on termination applies. To the extent any changes in payment allocation rules divert a larger portion of any customer payments to the competitive supplier and, commensurately, a smaller portion to the distribution company, customers will fall further behind on distribution bills and face a greater risk of termination. UWUA urges the Department to proceed cautiously with any changes and to make sure that the distribution company's past due charges always receive highest payment priority. Even allowing the supplier's past due amounts to be paid ahead of the distribution company's current due bills can increase the likelihood of termination in the future, if the customer fails to make payment the following month.

In conclusion, the Restructuring Act prohibits competitive suppliers from rendering consolidated bills without further legislative action. In addition, UWUA urges the Department to move cautiously with any changes to payment allocation rules.

UWUA thanks the Department for this opportunity to provide these comments.

Sincerely,

Charles Harak
Counsel, UWUA

cc: Andrew Kaplan, Esq., Hearing Officer (by hand and e-mail)
Parties on Department's June 20, 2001 list (by e-mail only)